BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID A. CARVER	)	
Claimant	)	
VS.	)	
	)	Docket No. 195,270
MISSOURI GAS ENERGY	)	
Respondent	)	
Self-Insured	)	

ORDER

The respondent requested review by the Appeals Board of the February 26, 1996, Award entered by Administrative Law Judge Alvin E. Witwer.

APPEARANCES

Claimant appeared by his attorney, Keith L. Mark of Mission, Kansas. Respondent, a self-insured, appeared by its attorney, Brian J. Fowler of Kansas City, Missouri. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

The respondent requested Appeals Board review of the following issue:

(1) The nature and extent of claimant's disability.

In claimant's brief, filed before the Appeals Board, the claimant asked the Appeals Board to review the following issue:

> (2) Whether the Administrative Law Judge erred when he reduced claimant's work disability award by the amount of claimant's preexisting permanent functional impairment as provided for in K.S.A. 44-501(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge awarded claimant a permanent partial disability of 36.5 percent based on work disability for a work-related injury occurring on July 14, 1994. Respondent has appealed and argues that claimant should be limited to permanent partial disability benefits based on permanent functional impairment because claimant's permanent restrictions following a 1991 work-related injury were the same as the permanent restrictions placed on claimant following his July 14, 1994, injury which is the subject of this appeal. The respondent asserts the record proves that claimant is entitled only to an award of permanent partial disability benefits of 5 percent. This 5 percent is the amount of permanent functional impairment that is attributed only to claimant's July 14, 1994, accident and is in excess of the functional impairment related to the 1991 injury.

On the other hand, claimant agrees with the determination by the Administrative Law Judge that he is entitled to a higher work disability instead of the lower functional impairment award. However, claimant argues that the record does not support the reduction of the work disability by the preexisting functional impairment claimant sustained as a result of the 1991 injury. Claimant further contends that if a credit is appropriate because of his preexisting injury, then the appropriate credit to apply should be based on K.S.A. 44-510a and not K.S.A. 44-501(c).

(1) Claimant sustained a previous injury to his low back while employed by the respondent's predecessor, Western Resources, Inc., on March 27, 1991. Western Resources furnished claimant with medical treatment for the low back injury through orthopedic surgeon Dr. Theodore L. Sandow of Kansas City, Missouri. Dr. Sandow diagnosed a herniated disc at L5-S1 and performed a laminectomy in June 1991. During claimant's rehabilitation, he suffered a recurrence of the problem and the doctor had to perform another surgical procedure in September 1991.

Claimant was released to return to work in March 1992 with Dr. Sandow opining that he had a 35 percent permanent whole body functional impairment. Claimant was permanently restricted to no lifting over 35 pounds and no prolonged sitting. Respondent

returned claimant to a clerk job which required him to sit at a computer terminal and perform data entry work. At the recommendation of Dr. Sandow, claimant was transferred back to his original leak surveying job in March 1993. The leak surveying job allowed claimant to move around and perform a variety of activities which better accommodated his residual pain and discomfort.

Claimant settled this initial workers compensation claim on October 28, 1993, in a hearing before a Special Administrative Law Judge. The settlement was based on a whole body functional impairment rating of 37.5 percent. At that time, claimant was working for the respondent performing the leak surveyor job that he had performed prior to the March 27, 1991, injury.

Claimant testified that he remained symptomatic after the 1991 injury with mainly soreness in his back area and leg that occurred early in the morning. The reinjury occurred while claimant was performing the job duties as a leak surveyor behind a mobile truck. However, claimant was able to continue to work for the respondent until he reinjured his low back on July 14, 1994. Before July 14, 1994, claimant was testing for gas leaks along service lines and houses that required him to do the strenuous jack-bar pounding portion of the job only three or four times per day. However, when claimant performed the leak surveyor's job behind a mobile truck he was required to do the repetitive and strenuous jack-bar pounding all day long.

Claimant notified the respondent of his increased back symptoms following the July 14, 1994, incident. He continued to perform his regular job until October 3, 1994, when he had increased symptoms while he was testing for a gas leak requiring him to place his survey bar in solid concrete. Following that incident, claimant was placed on light duty for two days and the last day he was able to work was October 5, 1994. The respondent first furnished medical treatment for the claimant's injury through a medical group of doctors located in Kansas City, Missouri. Claimant was then referred to Dr. Sandow, claimant's previous treating physician, who saw claimant on December 13, 1994.

Dr. Sandow had claimant undergo an MRI examination and found claimant had suffered no additional disc herniation as a result of this incident. The doctor treated claimant conservatively with physical therapy, back brace, TENS unit, and medication. Because the doctor found no further disc herniation, he did not recommend additional surgery. Dr. Sandow rated claimant on April 11, 1995, with a 5 percent permanent functional impairment due to the July 14, 1994, injury that exceeded the 35 percent functional impairment rating claimant was assessed for the March 1991 injury. Dr. Sandow restricted claimant from lifting over 35 pounds, no prolonged sitting or driving, and to avoid repetitive bending.

Claimant testified he contacted the respondent regularly during the time that he was off work following his July 14, 1994, injury in reference to returning to work. The

respondent never offered claimant any type of employment. At the time of the regular hearing held on September 13, 1995, the claimant had recently found part-time employment which paid him over a two-week period $162.50 per week as an automobile mechanic.

The parties have stipulated to a date of accident in this case of July 14, 1994. Therefore, claimant's entitlement to permanent partial general disability benefits is determined by the July 1, 1993, amendments to K.S.A. 44-510e(a) that provide in relevant part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of the portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of the functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of injury."

The record is clear that following claimant's July 14, 1994, injury the respondent did not offer claimant an opportunity to return to work for the respondent. The only job claimant had found since his injury was a part-time job earning $162.50 per week. The parties stipulated that claimant's preinjury average gross weekly wage was in the amount of $750. Accordingly, the Appeals Board finds that since claimant is not earning 90 percent of his preinjury wage, he is entitled to permanent partial disability benefits based on work disability as defined in K.S.A. 44-510e(a), if such disability exceeds claimant's permanent functional impairment.

The parties also stipulated that as a result of claimant's July 14, 1994, injury, he sustained a 5 percent permanent functional impairment to the body as a whole. Dr. Sandow was the only physician to testify in this case and opined that claimant's 1994 injury resulted in an additional 5 percent permanent functional impairment in excess of the preexisting 35 percent permanent functional impairment from the 1991 accident. The Appeals Board finds that the parties applied the July 1, 1993, amendment to the workers

compensation law contained in K.S.A. 44-501(c) when they stipulated to the 5 percent functional impairment rating. That amendment generally provides that an award of compensation for an aggravation of a worker's preexisting condition shall be reduced by the amount of functional impairment determined to be preexisting. Before July 1, 1993, an injured worker's preexisting disability if aggravated or accelerated by a subsequent injury was not apportioned between the disability resulting from the injury and the preexisting disability. *See* Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180 (1980).

As set forth above, the work disability test contained in K.S.A. 44-510e(a) is a two-prong test. The first prong is determined by claimant's loss of work tasks performing ability as expressed by a physician during the 15-year period preceding the accident. Again, Dr. Sandow was the only physician that testified in this case and his uncontradicted testimony established that as a result of the 1994 injury, claimant lost 60 to 80 percent of his ability to perform work tasks.

The respondent argues that claimant should be limited to the 5 percent functional impairment rating because claimant's permanent restrictions that were placed on him after the 1991 accident were the same restrictions that were placed on him after the 1994 accident. The respondent cites the case of Miner v. M. Bruenger & Co., 17 Kan. App. 2d 185, 836 P.2d 19 (1992) as holding that a worker's prior permanent restrictions must be considered in determining what, if any, work disability should be awarded. The Appeals Board finds respondent's reliance on the Miner case is misplaced. The Court of Appeals in Miner simply held that there was substantial competent evidence in the record to affirm the lower court's holding. 17 Kan. App. 2d at 190. The Court of Appeals did not decide whether prior permanent restrictions must be taken into consideration when determining work disability in every case.

Dr. Sandow treated claimant both for his 1991 injury and for his 1994 injury. Following the 1991 injury, Dr. Sandow recommended that claimant be returned to his previous job of leak surveyor that he had performed at the time of his 1991 injury. It is true, as argued by the respondent, that Dr. Sandow does not testify that claimant's permanent restrictions following his 1994 accident were essentially different than the restrictions he placed on claimant following the 1991 injury, except for no prolonged driving. However, Dr. Sandow also testified that claimant, after the 1994 injury, was significantly more severe than he was following the 1991 injury. Dr. Sandow reviewed the work tasks that claimant, during his regular hearing testimony, described he had performed since 1979. The doctor then opined that claimant had lost his ability to perform 60 to 80 percent of those work tasks. In fact, the only work task that Dr. Sandow determined claimant possessed the ability to perform after the 1994 injury was the data entry clerk job he performed following the 1991 injury for approximately a year. Included in claimant's work tasks description was the leak surveyor job claimant performed following the 1991 injury and was performing at the time of his 1994 injury. The Appeals Board concludes that when Dr. Sandow's testimony is taken as a whole, even though claimant's permanent restrictions did not

significantly change following the 1994 injury, that claimant's overall condition worsened as evidenced by the 5 percent permanent functional impairment increase Dr. Sandow assessed the claimant following the 1994 injury. The Appeals Board concludes that claimant's worsening condition following the 1994 injury, coupled with the respondent's refusal to return claimant to any type of work, substantiate that claimant's 1994 injury resulted in a work tasks loss as found by the Administrative Law Judge in the amount of 70 percent.

In regard to claimant's wage loss, the Appeals Board finds that the Administrative Law Judge's conclusion of 78 percent should be affirmed. This conclusion is based on claimant's actual earnings following his 1994 injury in the amount of $162.50 compared to claimant's average weekly wage at the time of his 1994 injury of $750.

K.S.A. 44-510e(a) requires both the 70 percent work tasks loss and the 78 percent wage loss be given equal weight in arriving at a work disability. Therefore, the Appeals Board finds that the Administrative Law Judge's conclusion that claimant is entitled to permanent partial disability benefits based on a work disability in the amount of 74 percent should be affirmed.

(2) The Administrative Law Judge reduced claimant's work disability of 74 percent by the 37.5 percent permanent functional impairment that was the basis for claimant's workers compensation settlement following his 1991 injury. This reduction was based on the July 1, 1993, amendment to K.S.A. 44-501(c) that provides that an award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The claimant disagrees with this reduction and argues that the reduction is not appropriate because the record does not contain evidence that claimant's preexisting back condition contributed to his resulting disability. Claimant makes this argument even though he stipulated that it was appropriate to reduce claimant's total functional disability as a result of both injuries by his preexisting 35 percent functional impairment that resulted from the 1991 accident as found by Dr. Sandow. The Appeals Board finds that Dr. Sandow's testimony firmly established that the claimant's 1994 injury aggravated his preexisting 1991 injury. Dr. Sandow opined that following the 1994 injury claimant's total functional impairment including the 1991 injury amounted to 40 percent. The 40 percent was a 5 percent increase over the impairment arising from the 1991 injury.

The Appeals Board also concludes that Dr. Sandow's opinion that claimant's 1994 injury increased his total functional impairment by 5 percent is persuasive evidence that satisfies the requirements of K.S.A. 44-501(c). Therefore, the Appeals Board finds that the Administrative Law Judge's award that reduced claimant's work disability by the 37.5 percent functional impairment rating that was the basis for his 1991 workers compensation settlement is appropriate. Accordingly, the Appeals Board affirms the Administrative Law Judge's award entitling claimant to a permanent partial disability award in the amount of 36.5 percent.

Claimant further argues that if the Appeals Board finds a credit is appropriate for claimant's preexisting disability, then the credit that should be applied is contained in K.S.A. 44-510a instead of K.S.A. 44-501(c). Although the legislature amended K.S.A. 44-501(c) in 1993 to reduce a claimant's award by his or her preexisting functional impairment, it retained the credit provisions contained in K.S.A. 44-510a. These provisions generally provide a reduction in the resulting permanent disability by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction is only applicable if compensation was actually paid or is collectible for the prior disability. Therefore, as in this case, if the record contains the appropriate evidence it is arguable both statutes could be applied. However, it would be inequitable and duplicative to reduce claimant's overall disability by his preexisting impairment twice.

The Appeals Board has examined the provisions of both statutes and, under the facts and circumstances of this case, finds that only the 1993 amendment to K.S.A. 44-501(c) should be applied. The Appeals Board concludes that one factor that should be considered in all cases where both statutes could arguably be applied is whether the date of accident is before or after July 1, 1993, the effective date of the amendment to K.S.A. 44-501(c). Thus, the Appeals Board finds that the Administrative Law Judge applied the correct statute, K.S.A. 44-501(c), when claimant's award was reduced by the percentage of his preexisting impairment.

All findings, conclusions, and orders of the Administrative Law Judge contained in his Award are affirmed by the Appeals Board and adopted in this Order as if fully set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Alvin E. Witwer dated February 26, 1996, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

_____
BOARD MEMBER

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BOARD MEMBER

CONCURRING OPINION

The undersigned Board Member agrees with the findings and conclusions as above stated and does so, in part, for the additional reasons stated in this concurring opinion.

As amended in 1993, K.S.A. 44-501(c) provides for a preexisting disability as follows:

> "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

I concur with the majority because I would construe K.S.A. 44-501(c) as a requirement that preexisting functional impairment be deducted from "any award." The dissents would reduce the work disability by reducing the task loss percentage to account for preexisting task loss. One dissent would, in addition, deduct the functional impairment. It does not seem likely the legislature intended to do both. I would apply the provision which states that it applies to "any award."

Before the 1993 amendments, the appellate courts had ruled that an aggravation of a preexisting condition should be fully compensable. The employer was treated as accepting the risk, with the exception of Workers Compensation Fund liability. Respondent was responsible for benefits based on the full disability, including the preexisting disability. Baxter v. L. T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987). This full responsibility concept was called into question by the decision by the Court of Appeals in Miner v. M. Bruenger & Co., 17 Kan. App. 2d 185, 836 P.2d 19 (1992). In that case, the Court of Appeals affirmed a decision which had rejected the opinion of a vocational expert who had not accounted for preexisting restriction when calculating the labor market loss. In my view, the precise intention of the Miner decision was never clarified. The Miner decision can logically be understood only as a decision to affirm the trial court because there was substantial competent evidence to support the decision, not as a reversal of Baxter and other similar decisions.

In this context the legislature amended K.S.A. 44-501(c) which it appears was a compromise intended to govern treatment of a preexisting disability. The amendment states that an employee should not recover for aggravation except to the extent of increased disability. It then states that "any award" should be reduced by the amount of functional impairment. I would construe the second provision for reducing by preexisting functional impairment as a clarification or explanation of what is intended by the first statement that an employee should recover only to the extent of the increased disability.

I would also, as indicated, deduct only the preexisting functional impairment and would not attempt to construct a new set of rules for calculating the task loss where there

has been another or preexisting task loss during the relevant fifteen-year work history. A new set of rules would be required because there are several ways one could account for preexisting restrictions. One could, for example, apply only new restrictions, i.e. restrictions added by the injury at issue, to all tasks performed in the fifteen-year work history. One could, in the alternative, apply the new or added restrictions only to the list of tasks not eliminated by prior restrictions. One might also logically apply new restrictions only to work done since the earlier injury. Regardless of the method chosen, the rules will be complicated and proof would be difficult, time consuming, and expensive.

I would calculate the task loss by applying the claimant's work restrictions, including preexisting restrictions, to the fifteen-year work history. If there has been another injury during that fifteen years with resulting restrictions, the subsequent tasks will be less demanding and new restrictions less likely to eliminate the tasks. The wage may have also already been reduced as a result of the prior injury and restrictions. The method of calculating work disability, in those ways, already tends to adjust for the prior injury and preexisting restrictions. After calculating the full task loss based on all restrictions, I would then deduct the preexisting functional impairment. This method seems to me more consistent with the statute and certainly simpler.

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority concerning its treatment of claimant's prior restrictions and tasks loss. The above decision grants claimant a work disability which is based upon a tasks loss opinion by Dr. Sandow which includes the work tasks claimant lost the ability to perform as a result of a prior injury. The restrictions resulting from that prior 1991 injury were essentially the same as the restrictions claimant was given following the subject injury. Dr. Sandow treated claimant following both injuries. He admits that except for an additional restriction against prolonged driving, the restrictions he imposed as a result of the 1991 injury are unchanged.

The Appeals Board has previously held that prior restrictions should be taken into consideration when determining the extent to which a claimant has lost the ability to perform work tasks under K.S.A. 44-510e(a). In Converse v. ADIA Personnel Services, Docket No. 184,630 (December 1996) the Appeals Board stated:

> "By enacting the 1993 amendments to K.S.A. 44-501(c) the legislature intended for workers with preexisting conditions to only be compensated for new injuries to the extent the new injury caused increased disability. . . . The legislative intent is best achieved by taking into consideration any preexisting restrictions when determining tasks loss."

The majority herein accepts a physician's tasks loss opinion which is not limited to the work tasks claimant has lost the ability to perform as a result of the new injury. The claimant's preexisting condition is taken into consideration only after the majority determines the claimant's percentage of work disability. The majority then subtracts out the amount of functional impairment determined to be preexisting, following K.S.A. 44-501(c). This approach is certainly easier to apply and, therefore, has some appeal. However, this is the approach that the majority of the Board specifically rejected in Converse.

The Appeals Board should continue to construe the tasks loss prong of the two-part work disability test in K.S.A. 44-510e(a) as referring to only those work tasks which the employee still had the ability to perform immediately prior to the injury which is the subject of the claim. The reduction for preexisting functional impairment provided for in K.S.A. 44-501(c) should be applied in cases where the award of permanent partial disability compensation is limited to the percentage of functional impairment, or where the preexisting condition does not result in any work restrictions applicable to the claimant's fifteen-year employment history.

In this case there is no evidence, in the opinion of a physician, of the percentage of work tasks claimant has lost the ability to perform out of those work tasks which he could still perform at the time of the subject injury. Therefore, in this regard, claimant has failed in his burden of proof. A zero percent tasks loss would then be applied and averaged together with the 78 percent wage loss to arrive at a work disability of 39 percent. As in Converse, since the zero percent tasks loss already fully accounts for claimant's preexisting condition, it is unnecessary to also subtract the percentage of functional impairment determined to be preexisting. Claimant should be awarded a 39 percent permanent partial general disability.

BOARD MEMBER

DISSENT

The undersigned concurs with the above Dissent in that claimant is entitled to a zero percent tasks loss for failing to prove the percentage of work tasks claimant has lost the ability to perform as a result of this injury. However, this Appeals Board Member would also apply the rationale of the majority and reduce the award by the amount of functional impairment preexisting pursuant to the language of K.S.A. 44-501(c). In line with the Dissent in Stanley D. Converse v. ADIA Personnel Services, Docket No. 184,630 this Board Member would hold that in addition to the zero percent tasks loss, the statutory

mandate of K.S.A. 44-501(c) requires the reduction of the preexisting functional impairment from the newly computed work disability.

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Brian J. Fowler, Kansas City, MO
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director